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The Aircraft Manufacturer's Liability for Design and Punitive Damages - The Insurance Policy and the Public Policy

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THE DRASTIC changes that the law in product liability litigation has undergone in recent years\(^1\) appear to be geared philosophically toward those same social concepts that have permeated other areas of American life, beginning many years ago with the development of the idea of society's general responsibility to individuals rather than that of individual self-reliance. Under our common-law system, courts continue to reflect present day social thinking that the financial burdens of personal catastrophes should be borne by those who society, rightly or wrongly, believes can better bear the loss; and, as a result, all manufacturers today continue to face increasing exposure to legal liability for accidents involving their products.

Although the exposure of products liability\(^2\) is nothing new to

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\(^{2}\) An aircraft manufacturer is subject to essentially the same legal duties as a manufacturer of any other product. See, e.g., North American Aviation, Inc. v. Hughes, 247 F.2d 517 (9th Cir. 1957); Carter Carburetor Corp. v. Riley, 186 F.2d 148 (8th Cir. 1951); Northwest Airlines, Inc. v. Glenn L. Martin Co., 224 F.2d 120 (6th Cir. 1955); Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th

For breach of implied warranty, see Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960); King v. Douglas Aircraft, 159 So. 2d 758 (3d Cir. 1963); Holcomb v. Cessna, 439 F.2d 1150 (5th Cir. 1971); Krause v. Sud-Aviation, 301 F. Supp. 513 (S.D. N.Y. 1968). In most states, liability can also arise under the doctrine of strict liability.

STATES PRESENTLY ADHERING TO THE DOCTRINE OF STRICT LIABILITY:

STATES NOT PRESENTLY ADHERING TO THE DOCTRINE OF STRICT LIABILITY:


STATES UNDECIDED OR UNCLEAR ON STRICT LIABILITY:

COLORADO: Newton v. Admiral Corp., 280 F. Supp. 202 (D. Colo. 1967). Under Colorado law, the manufacturer, wholesaler, and retail dealer or distri-
the aircraft manufacturer, what is new is the increasing financial burden resulting from the vast expansion in recent years of products liability theories. The defense of aircraft manufacturers in products litigation thus requires not only a thorough understanding of current legal considerations, but also requires some insight into possible future changes in the law. A vigilant and vigorous defense effort to challenge the ever-expanding legal theories being advanced

butor of a product warrants that the product is free from defects which render the product unreasonably dangerous to the user or his property. Schenfeld v. Norton Co., 391 F.2d 420 (10th Cir. 1968). Since there has been a paucity of decisions on products liability in Colorado "we do not know [sic] but surmise that Colorado will, in a proper case, embrace the concept of strict liability for all defective products, either in the name of tort or warranty." Clay v. Ensign-Bickford Co., 307 F. Supp. 288 (D. Colo. 1969), holding that Section 402(a) of the Restatement implies a warranty by the seller that the product is free from defects which render the product unreasonably dangerous to the user or his property and that such rule applies to the manufacturer of the product, as well as any retail dealer, distributor or wholesaler. FLORIDA: Royal v. Black & Decker Mfg. Co., 205 So. 2d 307 (Fla Dist. Ct. App. 1968).

It is not in itself a breach of duty by manufacturer to supply materials which are reasonably safe when customarily used, even though material might conceivably be made more safe, nor must the manufacturer make his product "more" safe when danger to be avoided is obvious to all. 

Id. at 310.

The primary concern is to protect the user from the unreasonably dangerous product or from one fraught with unexpected danger. Id. at 309 (emphasis in original).


Under Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965), a plaintiff must prove (a) the defect in the product of the manufacturer, and (b) that the injury or damage was caused by such defect.

The district court in Continental Casualty felt that Michigan courts, as per Piercefield, have adopted the strict liability in tort doctrine, but under the guise of the implied warranty theory.

A manufacturer in Michigan must be reasonable and prudent under all the circumstances. With product design, a manufacturer must use reasonable and ordinary care in planning or designing his product so that it is reasonably safe for the purposes for which it was intended. Farr v. Wheeler Mfg. Corp., 24 Mich. App. 379, 180 N.E.2d 311 (1970).

A manufacturer in Michigan must exercise due care in safeguarding its product against reasonably foreseeable risks to persons using that product in the manner intended and reasonably foreseeably; a manufacturer must make his products reasonably fit for their intended purpose; and it is the duty of a manufacturer to use reasonable care under the circumstances to design his product so as to make it safe for its intended use. This duty includes designing the product so that it will meet any emergency or use which can be reasonably anticipated. Grant v. National Acme Co., 351 F. Supp. 972 (W.D. Mich. 1972).
in products cases is essential to insure the judicial restraint necessary to equitably balance recovery for personal misfortunes with needed technological and economic development under our free enterprise system.

This article is intended to explore the liability of aircraft manufacturers in design defect cases, including the so-called "crash-worthiness" doctrine; and to discuss the manufacturer's liability for punitive damages, including the problems faced by them in attempting to obtain insurance coverage for those forms of damages.

I. LIABILITY FOR DEFECTIVE DESIGN

A. Negligence vs. Strict Liability

The doctrine of strict liability in tort has, unfortunately, been extended in a few jurisdictions to impose liability on a manufacturer for a design defect. The courts in these jurisdictions have accepted the argument that no compelling reason exists for distinguishing design from manufacturing defects, since either may render the product equally dangerous. The extension of the strict-liability-in-tort doctrine to include design defects is derived from long-established precedent that holds the manufacturer liable for negligence in designing its products. The basic elements of proof in those few jurisdictions that permit strict liability for product design, however, still remain the same as for strict liability for manufacturing defects.

In the remaining jurisdictions that have officially adopted the strict-liability-in-torts doctrine, as enunciated in the Restatement [of Torts], manufacturers can expect the consumer to continue to advance the extension of that doctrine to include claimed design defects. The usual arguments that are made to apply the strict liability doctrine in design defect cases include: that ultimate costs should be borne by the manufacturer because it created the risk in the first place by placing the product on the market; that insurance coverage is available to cover the loss, permitting the manufacturer to spread the expense of increased premiums to the public by raising the price of its product; that the manufacturer is better

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4 Cases cited note 3 supra.
able than the consumer to control any dangers created by a de-
fectively designed product; that the consumer relies on a manu-
facturer's representations; that the extension of the doctrine makes
it unnecessary to raise the privity of contract problems involved
in warranty actions; and that the plaintiff's burden of proof is
lessened, making it easier for an injured party to recover.\(^6\)

Admittedly, the application of strict liability in tort in design
defect litigation makes it easier for a plaintiff to recover. However,
the aircraft manufacturer is presented with several very serious
problems if he can be found liable under the law in design defect
cases without any evidence of negligence.

The initial problem arises simply because an adverse judgment
for defective design can render the manufacturer's total output of
his product unmarketable. A manufacturing defect, on the other
hand, usually only affects the individual product in question, or at
most, a portion of the total output of a particular product. Those
courts which have permitted liability for design defects, without a
finding of negligence, have done so where the manufacturer fails
to supply needed safety devices in the product design; where be-
cause of the design there is a concealed danger; and where the
design employed by the manufacturer calls for material of inade-
quate strength.\(^6\) If the application of the strict tort liability doctrine
in defect design cases is limited only to those actual situations that
clearly fall within the foregoing parameters, and is not allowed to
merge with those generally found in other manufacturing defect
cases, then the marketability of a manufacturer's entire product
line will be called into question only when it is clearly appropriate.

Secondly, any design engineer will concede that the design of
any product involves a series of compromises. If the cockpit win-
dows of an aircraft are enlarged to create better visibility, as one
simple example, the fuselage shell may be weakened, or other cock-
pit design problems, such as instrument visibility, would be created.
If the fuselage is then strengthened, the resultant weight gain and
decreased load-carrying capability or resultant instrument inacces-
sibility may then make the aircraft dangerous or unmarketable.

\(^6\) See Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 483, 150 P.2d 436 (1944)
(negligence rationale); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161
A.2d 69 (1960); Suvada v. White Motors Co., 32 Ill. 612, 210 N.E.2d 182
(1965). See also Restatement (Second) of Torts § 402(a), comment.

\(^6\) See cases cited not 3 supra.
This is but one small example of the thousands of decisions and judgments which any design engineer must make in the design of any aircraft. To permit a lay jury to "second guess" all design decisions years later in products litigation (without requiring any finding of negligence in the design) results in an unwarranted expansion of an aircraft manufacturer's liability.

Third, and probably the most perplexing problem of all, is the extent to which a plaintiff will be permitted to challenge standard design practices in those jurisdictions which have adopted the strict liability in tort doctrine for design defects. If all design decisions are subject years later to review on then existing standards, then a manufacturer cannot realistically protect itself without impeding meaningful technological development. This is an area where very careful analysis and judicial restraint is essential to effectively and equitably balance social concepts of recovery with desirable economic and technological progress.

Other problems face an aircraft manufacturer by an expansion of liability, without negligence, in the area of product design. When a manufacturer fails to follow proper standards of design practices—*i.e.*, is negligent, the resultant liability for a defective design is understandable and predictable; and the manufacturer can achieve some measure of protection by constantly improving his design methods and updating his knowledge. But when a manufacturer can be liable for a design defect without negligence, there is no realistic way that it can protect itself. Since all design decisions are based on compromises of one sort or another, three different design experts can each have a different concept of the design of an aircraft or one of its components—and each of the three could believe that the design of the other two is wrong, even though all three have followed the identical, known design standards which all three may agree are the proper ones, such as, for example, a standard set forth by government regulation.

The aviation industry today is one of the most, if not the most, government-regulated industries in the world. An analysis of the Federal Aviation Act, which governs the design and manufacture

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of aircraft, reveals quite explicit language in the requirements for testing of the entire aircraft. All of the tests are intended to insure the aircraft's reliability and safety. The certification by the United States government is a very important part of the aircraft manufacturing process; the manufacturer is prohibited by law from selling, and the operator is prohibited by law from flying, an aircraft not certificated by the government. Inasmuch as the entire process of certification is such an integral part of the design and construction of all aircraft, defense counsel must be thoroughly familiar with all its ramifications and must continue to make use of these government regulations and the arguments they suggest in defending design defect litigation.

Liability for negligent design is now fairly well established in products cases. However, particularly since aircraft manufacturers are already heavily regulated by the government, manufacturer's liability for defective design, even under negligence theories, should be based only upon legislative and regulative standards, and not upon the unpredictable morass of standards that result from case-by-case litigation of design problems. Liability for a design defect under strict liability, without any evidence of negligence of the aircraft manufacturer, only penalizes technological innovation and encourages the imposition at the time of verdict of design criteria generally not recognized at the time the aircraft was manufactured.

B. Crashworthiness: a Legislative, not a Judicial Function

With ever-increasing frequency, the proposition is being advanced that an aircraft manufacturer not only must design a "safe" aircraft to fly, but also must design a "safe" aircraft to crash. The leading case in this area of products liability law is the 1966 decision in *Evans v. General Motors Corp.*, in which the plaintiff advanced the theory that General Motors was liable because it manufactured an automobile that was unsafe for its occupants when it was involved in a collision. The Seventh Circuit Court of Appeals in *Evans* agreed with the trial judge, who had granted defendant's motion for summary judgment, that such an action could


* 359 F.2d 822 (7th Cir. 1966).
not be maintained, and held that a manufacturer is not under a duty to make his vehicle:

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\ldots \text{accident-proof or fool-proof; nor must he render the vehicle more safe when the danger to be avoided is obvious to all.}^9
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Although General Motors in *Evans* conceded that it had a duty to design automobiles that were reasonably fit for the purpose for which they were intended and had no latent defects, the court clearly held that the intended purpose of a motor vehicle:

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\text{does not include its participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such collisions may occur. As defendant argues, the defendant often knows that its automobiles may be driven into bodies of water, but it is not suggested that defendant has the duty to equip them with pontoons.}^{10}
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Similarly, aircraft may be flown by pilots who attempt to land on bodies of water, even though the aircraft has wheels as landing gears, but it has not been suggested that all aircraft must therefore be equipped with pontoons or floats. Aircraft also can be expected to collide with trees and buildings or impact with the ground, but it is clearly unjust to require an aircraft manufacturer to provide an aircraft "safe" for passengers in such a collision *as an intended use* of the aircraft. Indeed, as the *Evans* court stated:

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\text{Perhaps it would be desirable to require manufacturers to construct automobiles in which it would be safe to collide, but that would be a legislative function, not an aspect of judicial interpretations of existing law.}^{11}
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It should also be kept in mind that the issue as to the legal duty owed by an aircraft manufacturer to provide a "crashworthy" aircraft is an issue of law for the court, and not one for the jury.\(^{12}\)

In products liability litigation that involves crashworthy issues, the following basic reasons appear to underlie court decisions that

\[9 \text{Id. at 824.} \]
\[10 \text{Id. at 825.} \]
\[11 \text{Id. at 824.} \]
\[12 \text{Both *Evans* v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966), and the minority view of *Larsen* v. General Motors, 391 F.2d 495 (8th Cir. 1968), agree that the question of duty in design is a question of law for the Court.} \]
have held that no legal duty exists on the part of the manufacturer to provide a crashworthy product:

1. A manufacturer should not be required to make an accident-proof product.
2. A manufacturer should not be required to make a vehicle "crashproof" where the danger to be avoided (i.e., crashes) is obvious to everyone.
3. "Crashworthy" design criteria are legislative and not judicial functions.
4. The normal and intended use of an aircraft does not include its participation in a crash.
5. The manufacturer of aircraft should not be an insurer of all liability.
6. Juries are not the proper arbiters of design issues that do not involve crash causation.
7. Sensible public policy prohibits the retrospective imposition of such a duty.
8. Any legal duty to eliminate injuries and deaths in crashes would be impractical because of the myriad number and variety of types of aircraft accidents.
9. No legal duty exists on the part of a manufacturer to adopt every conceivable safety device.
10. Crashworthy claims invariably do not involve defects which proximately caused the accident.

The mere fact that everyone knows that aircraft sometimes crash does not mean that liability is co-extensive with foreseeability. Foreseeability is only one limited factor in determining whether a manufacturer has a legal duty. The principle that "liability" or "duty" is distinct from foreseeability has clearly been recognized by courts throughout the country. Foreseeability alone as a basis for legal duty has been rejected, and rightfully so, as applied to the so-called "crashworthiness" theory. There are many other ele-

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18 See Hoenig & Werber, Automobile "Crashworthiness": An Untenable Doctrine, 20 CLEV. L. REV. 578 (1971). This excellent article collects cases from throughout the country, effectively distinguishes the minority view of cases such as Larsen v. General Motors, 391 F.2d 495 (8th Cir. 1968), and should be read by all defense counsel involved in aircraft "crashworthiness" cases. For another view, see Roda, Products Liability—The "Enhanced Injury Case" Revisited, 8 THE FORUM 643 (1973).
ments, in addition to foreseeability, that are necessary to create a legal duty. If foreseeability were the sole test of a legal duty, then any person cut by a knife would have an action against the knife manufacturer; any person falling from skis, a bicycle, or roller skates, or injured while riding a motorcycle, would have recourse against the respective manufacturer.

As far as aircraft are concerned, there can be an almost unlimited variety of front-end, rear-end, sideward, low-speed and high-speed accidents. It is "foreseeable" that there will be collisions with other aircraft, buildings or trees. It is "foreseeable" that a fire may occur in any aircraft crash. It is certainly "foreseeable" that an aircraft will impact with the ground in a crash. Design decisions taken to avoid the consequences of some of these types of accidents necessarily will aggravate the consequences in other types of accidents. Nearly every accident situation, no matter how bizarre, is "foreseeable" if only because pilots seem to be able to discover every conceivable way of getting into trouble. At least the obligation that the courts now recognize in imposing the duty to manufacture an aircraft reasonably fit for the purpose for which it is intended—i.e., the transportation of person and property—is a somewhat objective standard. The aircraft manufacturer at least has some idea what he is required to do, albeit a jury may "second guess" it as to whether it has succeeded. On the other hand, the legal duty that proponents of the "crashworthiness" theory seek to impose—i.e., to build an aircraft that is "safe" or "reasonably safe" in a crash—does nothing but invite the jury to speculate retrospectively about what "safety" in a crash means.

The word "safe" when applied to accidents is a completely vague term and is without real meaning. How safe is "safe"? In collisions with what? Safe from impact? Safe from fire? At what speeds? What priorities should be stressed in terms of the various factors which affect the safety of any aircraft: sound structure, visibility, speed, economy, handling quality, maneuverability, or something else? In actual practice if such a legal duty existed, the court or jury would necessarily have to fix the standard that the case before it presents, and then determine whether the aircraft as designed met this newly found criteria.

Without a legal standard fixed objectively, a manufacturer can-

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14 See cases cited note 62 infra.
not ascertain what he must do to satisfy his responsibility under the law. Questions of this character are not appropriate for decision by a court or jury. Legislatures are much better equipped to evaluate the pertinent safety considerations to protect the consumer and to lay down the objective standards for prospective application. Any verdict which operates only retrospectively cannot do so. Focusing upon the specific accident before it, any plaintiff’s verdict in such a case will be based solely on the hindsight an expert in the particular circumstance may believe to have been, in his opinion, “safer.” Although a plaintiff in a particular lawsuit may benefit, the interest of the general public can better be served through appropriate legislation that sets forth clear criteria for the manufacturer. As pointed out by one proponent of auto safety:

Judicially enforced reform would of necessity be episodic and disorganized, dependent upon the fortuitous circumstances of individual lawsuits. . . . the imposition of safety standards on the automobile industry, can most likely be achieved better by a consistent application of regulatory standards drawn up by experts and kept current by research, rather than by ad hoc decisions of inexpert judges and juries.¹⁵

Only a legislature can most effectively balance conflicting public interests in deciding objectively what should be properly sacrificed in terms of consumer values, and what should not be done in those interests in the manufacture of a “completely safe” aircraft when involved in a crash. The many and complex technical questions involved in designing aircraft to minimize injuries and fatalities in the great variety of aircraft accidents can be more effectively dealt with by objective legislative and administrative action. An invitation to a court or jury to decide problems of design that are not related to accident causation is only an invitation to substitute hindsight, inconsistency, sympathy, and speculation in place of the overall balancing in the public interest of the social and economic questions involved in all aircraft design.

It is for these reasons that the majority of the courts that have decided this issue have properly held that the imposition of a legal duty advocated by proponents of the so-called “crashworthiness

¹⁵O'Connell, Taming the Automobile, 58 Nw. U.L. Rev. 299, 375 (1963). The same rationale applies to aircraft.
The "doctrine" must be created by the legislature, and not by the courts. The great weight of authority therefore rejects as a matter of law the contention that a manufacturer, absent legislation, is liable for crash consequences when the accident was not caused by any defect in the product. The majority view is also entirely consistent with the strict-liability-in-tort doctrine. All aircraft clearly involve some risk of harm to occupants when involved in crashes. This, alone, does not make them either unreasonably dangerous or defective. The few decisions to the contrary are based upon a rationally untenable test of "foreseeability." Federal legislation and administrative procedures today continue to move forthrightly into this entire problem area with massive funds, research, and technological expertise, which is really the best and most sensible approach in the public interest.

II. PUNITIVE DAMAGES AND PRODUCTS LIABILITY.

Considering the lengthy history of the doctrine of punitive damages, and the many years in which liability insurance has been available, it is surprising that the courts have been faced with so relatively few cases dealing not only with the question as to whether the insurance policy should cover punitive damages, but also whether punitive damages are appropriate awards in products liability litigation.

A. Historical Development of Punitive Damages.

One of the earliest, if not the first, recorded references to punitive damages can be found in the Bible.16 The origin of punitive damages in Anglo-Saxon jurisprudence can be seen in the early

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17 "For all manner of trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing, which another challengeth to be his, the cause of both parties shall come before the judges; and whom the judges shall condemn, he shall pay double unto his neighbor." Exodus 22:9 (King James).
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English common law; and, in this country, they became firmly established early in the life of the Colonies.

There are, essentially, three reasons that are suggested in the cases for the origin of the rule of punitive damages. First, the rule developed because of a refusal of some early courts to grant new trials when excessive damages were awarded in cases involving some form of malice, oppression, or fraud. Secondly, the doctrine arose because of other early courts’ failure to recognize certain injuries (e.g., mental anguish) as a proper measurement of damages. Thirdly, punitive damages became a vehicle to reimburse the plaintiff for damages not otherwise legally compensable (e.g., litigation expenses). While there are those who maintain that punitive damages have now outlived their usefulness and should be abolished, the doctrine appears to be firmly established in all except the following four states: Louisiana, Massachusetts, Nebraska, and Washington.

B. Modern Definitions and Trends

It is important, at the outset, to define punitive damages as the
words are usually used today. The term is somewhat vague and uncertain; and its meaning can vary from state to state, or from court to court. One of the best definitions can be found in an early Florida case:

Compensatory damages are defined as such as arise from actual and indirect pecuniary loss, mental suffering, value of time, actual expenses, and bodily pain and suffering. Exemplary, vindictive or punitive [sic] damages areas such as blend together the interests of society and of the aggrieved individual, and are not only a recompense to the sufferer but also a punishment to the offender and an example to the community.  

Punitive damages are usually defined to mean that the related misconduct is intentional, malicious, or consists of action or inaction that is so grossly wilful or which indicates such a conscious, aggravated disregard of others that a jury could conclude that the conduct takes on a criminal character regardless whether it is punishable as an offense against the State.

Punitive damages are therefore not based on conduct that is either simple negligence or is described as "wilful and wanton" under a state's compensatory automobile guest statute; unless, of course, the conduct amounts to such as to justify punitive damages as defined by the courts. In wrongful death actions, (that are created by statutes that provide a compensatory recovery) punitive damages have been held not permissible, since punitive damages by definition are not compensatory recoveries.  

While some courts consider punitive damages as extra compensation to the plaintiff, the overwhelming majority view is that they serve to punish and deter. For example, the Pattern Jury Instruc-

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30 Tedesco v. Maryland Cas. Co., 127 Conn. 533, 18 A.2d 357 (1941).
31 Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962).
tion on punitive damages given to the jury in Illinois states as follows:

... if you believe that justice and the public good requires it, you may, in addition to any damages to which you find plaintiff entitled, award plaintiff an amount which will serve to punish the defendant and to deter others from the commission of like offenses.

The Restatement of Torts, § 903, also recognizes punitive damages to be those damages, other than compensatory damages, awarded against a person to punish him for his outrageous conduct.\textsuperscript{22}

Until the last several years, punitive damage awards in products liability litigation were relatively rare, and few courts have been faced with the issue whether these types of damages are even proper in products liability cases. The present trend of some courts in permitting this form of recovery, and the increasing contentions made by plaintiffs in products cases to apply the legal theories of punitive damages, require continual and vigorous defense efforts to insure the judicial restraint necessary to equitably balance current social and “consumerism” demands with needed technological and economic development under this country’s free enterprise system.

The “windfall” nature to an injured party of punitive damages,\textsuperscript{23} and the enormous jury verdicts that have been rendered in the past few years in products liability litigation, easily illustrate the financial problem facing the aircraft manufacturer. A jury award of over $20,000,000 against Beech Aircraft in a products case in California\textsuperscript{24} is probably the recent case most familiar to the aviation community. A jury award of over $10,000,000 in punitive

\textsuperscript{22} See also Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173 (1931).

\textsuperscript{23} See Ghiardi, The Case Against Punitive Damages, 8 The Forum 411 (1972).

damages against another aircraft manufacturer also suggests the very serious potential economic exposure that face manufacturers in defending their products in today's social climate with its associated consumerism demands.

The award of punitive damages to injured consumers is not, however, an entirely new theory of liability. Rather substantial judicial precedent can be found in the case law for recovery of such damages by a consumer who is a victim of fraud or deception in the sale to him of consumer goods. However, an award of punitive damages based only on a defect in the product is an extension of a manufacturer's liability that goes far beyond a recovery for consumer fraud or deceit in the product, and is an area of products liability law that requires constant judicial re-examination and restraint in order to insure that such awards are permitted only in those situations in which the public interest demands protection from clearly proved intentional and outrageous conduct of a manufacturer. To allow the theory of punitive damage awards to be applied across the board in products liability cases—absent clear evidence of consumer fraud and deceit—is an unjustified and unwarranted extension of a manufacturer's potential liability if an equitable balance between the manufacturer and the consuming public is to maintain a valid goal in our free enterprise society. The cost to any manufacturer of punitive damage verdicts, based only on the manufacturing process, must ultimately be paid in any event by the consuming public; and since punitive damages are almost universally recognized as a form of "civil punishment" to a defendant, the consuming public would otherwise ultimately end up "punishing" itself through increased prices of the products. The consuming public's interests can be protected by limiting punitive damage awards only to clearly proved cases involving elements of fraud or deceit to the consumer. Otherwise, the long term consequences of judicial failure to equitably balance the interest of the consumer with that of the manufacturer will result in either protective legislation (that is restrictive to the consumer) to insure needed technological and economic progress, or will result in drastic

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37 Notes 31 & 32 supra.
changes in the entire adversary system of compensation for product-induced injuries that would not be in the consuming public's interest. Competitive factors in the market place is a sufficient deterrent to a manufacturer when punished in a civil suit for conduct amounting to fraud or deceit in the manufacturing and selling processes. Punitive damage awards that are permitted on any lesser proof does not serve to equitably balance both the consumer and the manufacturer's interests.

C. Fraud and Deceit Theories and Product Liability

Fraud and deceit is essentially an intentional tort; under the Restatement, it consists of several substantive elements. First of all, there must be a false representation on the part of the defendant, made with actual knowledge of its falsity, and with the intention of inducing a party to act or refrain from acting on the representation. There must also be a justifiable detrimental reliance by the plaintiff on the false representation.

Although there is some authority that permits punitive, as well as compensatory damages, on proof only that the tort has been committed, the majority and better reasoned view is that a claim for punitive damages, in an action based on the elements of fraud or deceit, must also be supported by evidence of conduct amounting to either malice, or of a spirit akin to criminal indifference to civil obligations. The same legal considerations that are involved in punitive damage awards in the typical consumer fraud case

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40 District Motor Co. v. Rodill, 88 A.2d 489 (D.C. Mun. Ct. 1952). Punitive damages in an action for fraud are proper where it appears that the defendant acted maliciously, wantonly, oppressively or with a spirit of mischief or criminal indifference to civil obligations. However, some states that profess to follow the majority in requiring an additional showing of "legal malice" have substantially liberalized that concept. See Jones v. Westside Buick Co., 231 Mo. App. 187, 93 S.W.2d 1083 (1936). "Legal malice" means simply the intentional doing of a wrongful act without just cause or excuse, and not the necessity for the showing of any spite or ill will, or that the act was willfully or wantonly done. Id. at 199, 93 S.W.2d at 1088.
41 For a persuasive argument of the case for punitive damages in consumer fraud cases, see Walker v. Sheldon, 10 N.Y.2d 401, 179 N.E.2d 497, 223 N.Y.S.2d 488 (1961). In the Court's majority opinion, Judge Fuld argues that those who deliberately and coolly engage in a far-flung fraudulent scheme, systematically conducted for profit, are very much more likely to pause and consider the consequences if they have to pay
are relevant in the area of product liability law. They become highly relevant where an attempt is made to apply the basic purpose of a punitive damage award to a manufacturer's liability for defects in their products, absent any evidence of consumer fraud or deceit.

One of the first punitive damage awards permitted in a case having products liability overtones was *Standard Oil v. Gunn,* decided by the Alabama Supreme Court in 1937. In this case, the plaintiff's automobile was damaged because adulterated low grade oil, represented by Standard Oil to be high grade oil, was sold to and used by the plaintiff. Although the action was based on fraud and deceit, as well as breach of contract, the litigation revolved around the existence of a defective product—the adulterated low grade oil. The Alabama Supreme Court upheld a jury verdict for punitive damages based on the jury's finding that Standard Oil, through its agents, had acted fraudulently (by its misrepresentations) toward the plaintiff. Surprisingly, *Standard Oil* stands alone, and has been ignored by the appellate courts for over 36 years.\(^4\)

However, in the latter 1960's when imaginative counsel resurrected punitive damage theories and argued their application to products liability cases, the confusion that arose from this seemingly "new" exposure of the manufacturer has unfortunately resulted in a failure of the judiciary to clarify fully the theories upon

more than the actual loss suffered by the individual plaintiff. An occasional award of compensatory damages against such parties would have little deterrent effect . . . . In the calculation of his expected profits, the wrongdoer is likely to allow for a certain amount of money which will have to be returned to those who object too vigorously, and he will be perfectly content to bear the additional cost of litigation as the price for continuing his illicit business.

*Id.* at 404, 179 N.E.2d at 499, 223 N.Y.S.2d at 492. Although suggesting that punitive damages would serve as an inducement to litigate in those cases where compensatory damages alone would not suffice, Judge Fuld's principal reliance seems to be based on the punishment deterrence ground. See also Comment, *Translating Sympathy for Deceived Consumers Into Effective Programs for Protection,* 114 U. PA. L. REV. 395, 426-27 (1966). See also *Developments in the Law—Deceptive Advertising,* 80 HARV. L. REV. 1005, 1123 (1967).

\(^4\) 234 Ala. 598, 176 So. 332 (1937).

\(^4\) Although *Standard Oil Co. v. Gunn* seems to stand alone in awarding punitive damages in products liability cases based on fraud and deceit, awards of compensatory damages in similar actions are more readily found. See L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* ch. 4 (1971); R. HURSH, *AMERICAN LAW OF PRODUCTS LIABILITY* §§ 4.2-4.5 (1961).
which punitive damage awards in product litigation may or may not be appropriate. This failure has in turn led, in the early 1970's, to untoward attempts to extend punitive damage theories to products liability cases when elements of consumer fraud or deceit are not even involved.

The application of punitive damage theories to products liability cases attracted renewed interest in 1967 in Toole v. Richardson-Merrell, Inc. The California Court of Appeals in Toole upheld a punitive damage award based on evidence that some corporate officers of the manufacturer not only knew of the dangerous effects of the drug, MER/29, but also intentionally withheld that information from the Food and Drug Administration. In Toole, it was the defendant's continuous act of promoting the sale of the drug with actual knowledge of its dangerous side effects (thereby meeting requirements under the Restatement for the tort of fraud and deceit) that satisfied California statutory punitive damage requirements of "malice" and thus permitted the imposition of punitive damages. Apparently no argument was raised on appeal of the general propriety of a punitive damage award in a products liability situation. Nor did the California Court clarify that the ground rules for the imposition of punitive damages in products cases required proof of the elements of the common law tort of fraud and deceit, even though this was what the case was really all about.

To add to the confusion, the Second Circuit Court of Appeals also in 1967, in another MER/29 case, reversed a jury verdict against the defendant for punitive damages. In Roginsky v. Richardson-Merrell, Inc., plaintiff sued under both negligence and fraud theories; and the court, in a lengthy opinion, held that the record contained insufficient evidence of fraudulent conduct so as to sustain the jury's verdict for punitive damages under New York law. Although the court in Roginsky did not address itself directly to the issue whether punitive damage awards should be permitted


\[45] Cal. Civ. Code § 3294 (West 1971), which in relevant parts provides: "In an action for breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to actual damages, may recover damages for the sake of example and by way of punishing the defendant."

\[46] 378 F.2d 832 (2d Cir. 1967).
as a general rule in products cases, absent evidence of fraud, the court did attempt to balance the consumer interests with those of the drug manufacturer:

Although multiple punitive awards running into the hundreds may not add up to a denial of due process, nevertheless if we were sitting as the highest court of New York we would wish to consider very seriously whether awarding punitive damages with respect to the negligent—even highly negligent—manufacture and sale of a drug governed by federal food and drug requirements . . . would not do more harm than good. A manufacturer distributing a drug to many thousands of users under government regulation scarcely requires this additional measure for manifesting social disapproval and assuring deterrence. Criminal penalties and heavy compensatory damages, recoverable under some circumstances even without proof of negligence, should sufficiently meet these objectives . . .

The court in Roginsky thus reasoned that since punitive damage awards are ultimately passed on to the consuming public, the deterrent value of punitive damages, in addition to heavy compensatory damages that are recoverable under some circumstances even without proof of negligence was “probably needless.” Although both the Second Circuit in Roginsky and the California Court in Toole indirectly required proof of some evidence of fraudulent conduct before applying the theories of punitive damages in the products cases before them, neither court clearly set forth the criteria contained in the Restatement (on which the facts in both cases actually revolved) for the tort of fraud and deceit.

The effects of the resulting confusion can be aptly demonstrated by the 1970 decisions of the Illinois Appellate and Supreme Courts in Moore v. Jewel Tea Co. Eleven months before the accident, the plaintiff in Moore purchased a can of “Drano” that she then stored in her kitchen. The can remained unopened during the eleven month storage period, and exploded when the plaintiff took it from under the sink to use it. The complaint alleged strict tort liability, negligence and wilful and wanton conduct and prayed for

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47 Id. at 840-41.
48 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).
49 Supra note 38.
50 The Illinois appellate decision can be found in 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969); the Illinois Supreme Court opinion can be found in 46 Ill. 2d 288, 263 N.E.2d 103 (1970).
both compensatory and punitive damages. Her injuries (blindness in both eyes) resulted in a jury verdict against the manufacturer of $920,000 in compensatory damages and $10,000 in punitive damages.

In affirming the jury's verdict as to punitive damages, the Illinois appellate court in 1969 referred initially to "well established" Illinois precedent that permitted punitive damages where there is evidence of "wilful and wanton conduct" (citing only a 1958 Illinois decision\(^1\) that involved an automobile accident). The appellate court then referred to three Illinois cases;\(^2\) one involved adultery, another the definition of malice, and the third involved fraud in an employment contract. The court then stated that "such issues [wilful and wanton] are not unknown in products liability cases,"\(^3\) and cited as authority for that statement the California decision in \textit{Toole v. Richardson-Merrell, Inc.}\(^4\) (which dealt with a California statutory\(^5\) definition of "malice" and actually involved the common law tort of fraud and deceit, and not "wilful and wanton" definitions). Following the misapplication of these cases, the Illinois appellate court then concluded that the knowledge by the defendants of the potential dangerousness of their product, coupled with the notice to them of prior claims of spontaneous explosions and their failure to warn the public as they did their own employees presented a question for the jury to determine whether the defendants were guilty of wanton and wilful conduct.\(^6\)

The court further stated that "the question of wilful and wanton conduct is essentially whether the failure to exercise care is so gross that it shows a lack of regard for the safety of others"\(^7\), an extremely broad and loose definition. The appellate court thus affirmed the $10,000 punitive damage verdict in three brief para-

\(^2\) Seifert v. Solem, 387 F.2d 925 (7th Cir. 1967); Peters v. Lake, 66 Ill. 206 (1872); Chapin v. Tampoorlos, 325 Ill. App. 219, 59 N.E.2d 334 (1945). The court also cited \textit{Restatement of Torts}, § 908.
\(^3\) 253 N.E.2d at 648.
\(^4\) 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).
\(^6\) 253 N.E.2d at 649.
\(^7\) \textit{Id.}
graphs of an otherwise very lengthy opinion that also affirmed the $920,000 compensatory award.

The additional confusion that the appellate decision in Moore created in products liability litigation as it relates to punitive damages was worsened when the Illinois Supreme Court, in its 1970 opinion affirming the appellate court, made no mention whatsoever of either the punitive damage verdict or the legal bases on which such liability should be permitted in products liability litigation.

The latest expression of Illinois law as to punitive damages is the 1973 decision of the appellate court in Pierce v. DeJong,"8 where the court stated as follows:

We turn finally to the award of $5,000 as punitive damages. Punitive damages are not "a favorite in the law" and are allowable only where the conduct is accompanied by aggravated circumstances such as wilfullness, malice, fraud or violence . . . [citing Illinois cases]. There is no evidence in this record as the trial court observed in its opinion "that defendants or any of them set out with deliberate intent to harm anyone's property or inflict any damage on the plaintiff."

By these comments, the appellate court in Pierce clarified to some extent the definition of punitive damages that were made applicable to wilful and wanton conduct three years earlier by the Illinois appellate court in Moore.

Although a few courts at the appellate level have thus recently dealt with punitive damages in products liability cases, they have not yet discussed fully the theory upon which such a recovery may or may not be appropriate. As a result, all manufacturers continue to be faced today with increasing punitive damage claims at the trial court level; and neither the defendants nor the plaintiffs in such cases are yet able to effectively evaluate their respective positions, unless the factual situation raises issues of consumer fraud or deceit such as those involved in the MER/29 cases.61

D. Negligence vs. Strict Liability and Punitive Damages

As a conceptual matter, the duty to refrain from negligent con-

60 Id. at —, 300 N.E.2d at 785.
61 See cases cited notes 44 & 46 supra.
duct in products cases is little different from that in other negligence cases, since the test of liability depends upon whether the manufacturer has maintained a reasonable standard of performance. Such a standard can very often be found in the conduct of other manufacturers, as well as in the governmental certification procedures that all aviation manufacturers must follow in the design and manufacture of their aircraft.

As is evident from the enormous jury verdicts for punitive damages returned against manufacturers in the last few years, aircraft manufacturers face very substantial financial exposure that was unheard of, in most cases, at the time the product was designed and manufactured. With all of the government regulations in the aircraft manufacturing industry, and the very heavy compensatory awards now being given to injured parties, the New York court in Roginsky was perhaps correct when it indicated that the imposition of punitive damages as a deterrent is a needless doctrine to be imposed on manufacturers in today’s society. In today’s economic climate, a single manufacturer can be exposed to a multiplicity of claims for punitive damages, with no clear guidelines or consistency in application of the doctrine. This inconsistency raises serious Constitutional questions.

The reawakening of consumer demands, competition in the market place, the higher and higher verdicts for compensatory damages, the general inflationary spiral, current union and labor demands, governmental regulation—all of these often-conflicting interests support the thought that the doctrine of punitive damages, if they are to be applied to products cases, must be applied with the utmost caution, and with the greatest judicial restraint and understanding of the problems of the

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63 Supra note 7.

64 Supra notes 34 & 35.

65 378 F.2d 832 (2d Cir. 1967).

aircraft manufacturer in today's society. No responsible management would probably quarrel with the principle that if they were to engage in acts that amount to a fraud on the public in the manufacture and distribution of their product, they should then be held accountable through the civil procedures now established. However, compared with the ordinary products liability case, aviation accidents are more spectacular, the resulting damages are more severe, and the personal tragedies attendant to such accidents oftentimes tempt juries to decide liability issues by hindsight, inconsistency, sympathy and speculation. The reversal, or the granting of new trials, in some of the products cases involving punitive damages indicates that some courts are making efforts to balance more equitably the conflicting social and economic questions involved in all product design problems.

When a plaintiff relies on a strict liability theory, logic compels the conclusion that punitive damages are inappropriate. Under strict tort liability, all the plaintiff need prove is that there was a defect that made the product unreasonably dangerous at the time it left the manufacturer's control and that the injury was proximately caused by the defect.\(^7\) Punitive damages, on the other hand, are intended to be a form of civil punishment and are intended to be applied only in those situations where the wrongful acts are intentional, fraudulent, malicious, or are of such an outrageous character that there is little doubt that the reprehensible act justifies the imposition of such an extraordinary remedy.\(^8\) Punitive damages cannot therefore be justified on mere proof that a defective product was manufactured and distributed by a defendant. The difficulty, of course, lies in the fact that plaintiffs are usually permitted to sue under alternate theories of liabilities, all of which may go to the jury.\(^9\) Since a jury may be instructed that proof of a defect under strict liability theories is sufficient to impose liability, the necessity of a much more careful analysis and balancing of social and economic interests by the trial court become more apparent in a products case than in the ordinary negligence action.

\(^{67}\) Restatement of Torts § 402A. See also cases cited note 2 supra.

\(^{68}\) Supra notes 31 & 32.

E. The Insurance Policy and the Public Policy

The legal issues involved in insurance coverage for punitive damages are basically twofold: contract interpretation, and public policy. Of the two, public policy should be by far the most important consideration. With one recent exception, no case has been found where the court has prohibited such coverage where it did not consider, and base its decision on, the public policy issues. On the other hand, those few courts which have permitted such coverage often fail to discuss the public policy purposes of punitive damages, and base their decision solely on an interpretation of the insurance contract.

No standard insurance policy form used today contains an express exclusion for punitive damages. Typically, the policy provides that the insurance company shall be obligated to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury.

The Early Cases

There are some earlier decisions which interpreted the pre-1966 standard insurance policy forms to cover both compensatory and punitive damages, but most of these cases are now of doubtful

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70 See Brown v. Western Cas. & Sur. Co., 484 P.2d 1252 (Colo. App. 1971). In this case, the insured contended that since punitive damages were not specifically excluded from the policy (standard form), they were included. In quoting from and citing Universal Indem. Ins. Co. v. Tenery, 96 Colo. 10, 39 P.2d 776 (1934), the court in Brown stated as follows: "From the above it is clear that exemplary damages are not awarded 'because of bodily injury.' They are not compensatory and are not covered by the above quoted provision of the policy." 484 P.2d at 1253.


73 See United States Fid. & Guar. Co. v. Janich, 3 F.R.D. 16 (S.D. Cal. 1943), which involved unusually broad policy language; Employers Ins. Co. v. Brock, 172 So. 671 (Ala. 1937), which involved Alabama's unique wrongful death statute which views all damages for wrongful death as punitive; Maryland Cas. Co. v. Baker, 304 Ky. 296, 200 S.W.2d 757 (1947), which involved public carriers. See also General Cas. Co. v. Woody, 238 F.2d 452 (6th Cir. 1956); Ohio Cas. Ins. Co. v. Welfare Fin. Co., 75 F.2d 58 (8th Cir. 1934), cert. denied, 295 U.S. 734 (1935); United States Fid. & Guar. Co. v. Janich, 3 F.R.D. 16 (S.D. Cal. 1943); Pennsylvania Threshermen & Farmers' Mut. Cas. Co. v. Thornton, 244 F.2d 823 (4th Cir. 1957).
precedence, since the language of current standard policies is substantially different from that used twenty or thirty years ago.

More and more courts in recent years have held categorically that one cannot insure against his own liability for punitive damages as a matter of public policy. A few early courts also discussed the public policy considerations. In *Universal Indemnity Insurance Co. v. Tenery,* a Colorado court in 1934 recognized the deterrent effect of punitive damages:

> The insurance company did not participate in this wrong, and was under no contract to indemnify against such... The injured will not be allowed to collect from a non-participating party for a wrong against the public.

In *Tedesco v. Maryland Casualty Company,* a Connecticut court in 1941 held that since it was obviously against public policy to permit an insurance company to pay its insureds’ fines for criminal violations, the burden of non-compensatory punitive damages that the court recognized as a form of civil punishment was also prohibited as a matter of public policy.

**Modern View**

The leading case in this entire problem area, with the most persuasive and clearest formulation of the public policy arguments that prohibit, as a general rule, insurance coverage for punitive damages is the decision of the Fifth Circuit Court of Appeals in *Northwestern National Casualty Company v. McNulty.* The insurance policy involved in *McNulty* was a typical family combination automobile policy that agreed to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injuries. The policy was issued in the State of Virginia where the insured resided, and the accident happened in Florida. The insured, a drunken driver, while going eighty miles per hour smashed into the rear of the plaintiff’s car; and then left the scene. The jury returned a verdict for $37,500

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74 96 Colo. 10, 39 P.2d 776 (1934).
75 Id. at —, 39 P.2d at 779.
77 307 F.2d 432 (5th Cir. 1962).
in compensatory damages and for $20,000 in punitive damages. The policy limits were $50,000. On appeal, the insurer's argument that the language of the insurance contract did not cover punitive damages was not reached by the Court:

We find it unnecessary to construe the contract; we hold that should a policy provide specifically for such coverage it would contravene public policy.\(^8\)

The court in \textit{McNulty} initially recognized that the strength of a public policy against insuring punitive damages depended on the nature or purpose of punitive damages. The court held that "the most widely accepted basis for punitive damages in other American jurisdictions"\(^9\) was that punitive damages are imposed as a means of punishment and deterrence. Since this is the basic purpose of punitive damages, the court concluded that:

there are especially strong public policy reasons for not allowing socially irresponsible automobile drivers to escape the element of personal punishment in punitive damages when they are guilty of reckless slaughter or maiming on the highway.\(^8\)

To permit an insured to shift the burden of punitive damages to his insurance carrier would frustrate the reason for the existence of the doctrine. The court in \textit{McNulty} declared that:

[Punitive] damages do not compensate the plaintiff for his injury since compensatory damages already have made the plaintiff whole. And there is no point in punishing the insurance company; it has done no wrong. In actual fact, of course, and considering the extent to which the public is insured, the burden would ultimately come to rest not on the insurance companies but on the public, since the added liability to the insurance companies would be passed along to the premium payers. Society would then be punishing itself for the wrong committed by the insured.\(^8\)

Since the 1962 decision in \textit{McNulty}, courts in Arizona,\(^8\) Arkansas, and other states have acknowledged the principle that punitive damages may not be recovered from insurers unless specifically provided for in the insurance contract.

\(^8\) \textit{Id.} at 434.
\(^9\) \textit{Id.} at 436.
\(^10\) \textit{Id.} at 441.
\(^11\) \textit{Id.} at 440-41.
sas,73 Colorado,74 Florida,75 Missouri,76 New Jersey,77 New York,78 Pennsylvania,79 South Carolina,80 Tennessee,81 and the 10th Circuit,82 have done so; and of these only Arizona, Arkansas and Tennessee have specifically considered and rejected the public policy rationale expressed in McNulty.83

In fact, there appear to be only four relatively recent cases in the country that hold that there is insurance coverage for punitive damages under the provisions of a standard insurance policy. In Carroway v. Johnston,74 the Supreme Court of South Carolina held in 1965 that the words “all sums” of the insurance policy included punitive damages. The authorities relied upon by the court in Carroway indicate, however, that this case is very questionable authority since the court relied upon cases dealing with vicarious liability,84 cases based on unique statutes,85 and cases involving estoppel on a combined compensatory/punitive default judgment.86 None of the cases cited by the Carroway court were really on point,87 and the court did not even consider any public policy issues.

76 Crull v. Gleb, 382 S.W.2d 17 (Mo. App. 1964).
83 South Carolina, which has held punitive damages covered, has done so only on the basis of contract interpretation and has not specifically rejected a public policy argument. See Carroway v. Johnson, 245 S.C. 200, 139 S.E.2d 908 (1965).
84 Id.
85 The court relied on Ohio Cas. Ins. Co. v. Welfare Fin. Co., 75 F.2d 58 (8th Cir. 1934), which involved vicarious liability and was not on point.
86 The court cited American Fid. & Cas. Co. v. Werfel, 164 So. 383 (Ala. 1935), which dealt with unique Alabama statutes and was not on point.
88 The court also cites 7 J. Appleman, Insurance Law & Practice §§ 4312, 4900 (1962). However, Appleman gave no consideration to the many weaknesses in the cases he cites. Many courts have cited Appleman in holding that
In Southern Farm Bureau Casualty Insurance Co. v. Daniel,90 decided by the Arkansas Supreme Court in 1969, a majority of
the court, relying heavily on Carroway,100 reasoned that the differ-
ence between punitive and compensatory damages was not clear;
and believing that there was no public policy against the result,
held that punitive damages were within the contractual terms of
the policy. A very strong and lengthy dissent based primarily on
public policy grounds was made.101
In 1972, the Supreme Court of Arizona in Price v. Hartford
Accident & Indemnity Co.,102 a declaratory judgment action, held
in essence that the public policy of Arizona to require an insurance
carrier to honor its contractual obligations (to pay all sums for
which the insured may be liable) overrode any public policy to
prohibit insurance coverage for punitive damages. The plaintiff in
Price had a typical automobile policy with limits of $1,000,000.

punitive damages are covered under liability insurance policies. Appleman is
about the only treatise in modern times to take the position that, as a general
rule, coverage for punitive damages is not against public policy. Appleman sim-
ply states that the average insured expects such coverage. The public policy ra-
ationale is unsound according to Appleman, in that
defendant's conduct was not willful. He had no present intent to
injure plaintiff. Had his act been willful, in the sense that he in-
tended injury to the plaintiff, the insurer would have been com-
pletely absolved of liability. It seems strangely inconsistent for an
insurer, in one breath, to admit liability for compensatory dam-
ages, and then to deny liability for that part of an award claimed
attributable to reckless or wanton conduct. . . .
[The] arguments apply with equal force to punitive damages. In
any event, a court should not aid an insurer which fails to exclude
liability for punitive damages. Surely there is nothing in the insuring
clause that would forewarn an insured that such was to be the
intent of the parties.
Id. at § 4312 (Supp. 1972).

By this comment, Appleman ignores the court's basic holding in McNulty
that the rule applies only when the conduct involved is "intentional," either in
the sense of a conscious intent to injure or a conscious, malicious and aggravated
disregard of another's rights. Also, later in his treatise, Appleman contradicts his
own position by stating in § 4312 that in cases "where the insured's conduct is
grossly violative of public policy, and punitive damages are awarded on that ac-
count, public policy may dictate that he should bear his own punishment. . . ."
90 246 Ark. 849, 440 S.W.2d 582 (1969).
100 245 S.C. 200, 139 S.E.2d 908 (1965).
101 As the dissent indicated, Carroway is worthless as precedent because of
a South Carolina statute requiring that a liability insurance policy must insure
"against loss from the liability imposed by law." 246 Ark. at —, 440 S.W.2d
at 585.
The insured's son injured another when he was drag racing the insured automobile. Suit was filed against the son for gross negligence, wantonness and recklessness, and against the insured for negligent entrustment, alleging also that the son was the agent of the insured. After quoting from the McNulty decision, the Arizona court described what it believed to be six reasons why the McNulty rule should not apply: (i) that drag racing is a criminal offense and the son would be subject to punishment by the State for his acts; (ii) Hartford voluntarily contracted to pay "all sums" and received a premium based in part on the risk of punitive damages; (iii) criminal penalties included possible loss by the son of his driver's license and compulsory traffic school attendance; (iv) the possibility that punitive damages may exceed policy limits is a sufficient deterrent (the limits were $1,000,000 and the possibility of a verdict against a teenager and his mother anywhere near the limits was remote, so this portion of the court's ruling makes little sense); (v) no evidence that failure to insure punitive damages had decreased automobile accidents [thus the court inconsistently argues that punitive damages serve no purpose as a deterrent]; and (vi) an insurance carrier should honor its obligations. The court seemed impressed with the statements made in Appleman1⁰⁵ that the insured expects punitive damage coverage, and cited only Lazenby v. Universal Underwriters Insurance Company¹⁰⁴ in support of its conclusions.

In Lazenby, the Supreme Court of Tennessee in 1964 gave essentially three reasons in holding that punitive damages were covered under the policy: (i) that most courts have held there is coverage as a matter of contract interpretation (the court cited no authority for this proposition); (ii) that punitive damages cases cannot be easily distinguished from ordinary negligence cases; and (iii) that punitive damages do not deter undesirable conduct.

The latter two arguments of the court in Lazenby were adequately and persuasively answered two years later by the Court of Appeals for the Tenth Circuit in American Surety Company of

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¹⁰⁴ 214 Tenn. 639, 383 S.W.2d 1 (1964).
New York v. Gold, where the court as to the lack of deterrent effect, stated that:

This argument seems to miss the mark, for we may as well say criminal sanctions serve no useful purpose just because they are constantly violated. The question is not so much the efficacy of the policy underlying punitive damages; rather it is a question of the implementation of that policy. Permitting the penalty for the misdeed to be levied on one other than he who committed it cannot possibly implement the policy.

As to the inability to distinguish between ordinary and punitive damages, the court in Gold also stated:

We must assume, however, any given jury will accurately follow the law and correctly distinguish liability for ordinary from liability for gross and wanton negligence. To hold to the contrary would impugn the integrity of the jury system.

Vicarious Liability Exception

It should be emphasized that in McNulty, the insured was both the owner and operator of the vehicle involved in the accident; and the insured, and he alone, was the one guilty of the conduct causing the imposition of punitive damages. The McNulty court recognized, however, that an employer is not prohibited from obtaining insurance coverage to protect himself against liability for punitive damages that are assessed against him for the wrongful conduct of his employees—providing that the employer has not directly or indirectly participated in the wrongful conduct. In Illinois, this principle was also recognized in 1969 in Scott v. Instant Parking, Inc., where the court, in holding that a $10,000 punitive damage award was covered, stated:

[this case] involves only the right of a corporation to insure against liability [for punitive damage] caused by its agents and servants. There is no reasonable basis to declare the latter type insurance is against public policy.

Since punitive damages can be awarded against a principal be-

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105 375 F.2d 523 (10th Cir. 1966).
106 Id. at 527.
107 Id.
109 Id. at —, 245 N.E.2d at 126.
cause of the act of his agent, as the courts in both McNulty and Scott recognized, there is no logical reason why an employer who doesn’t actually participate in the wrongdoing should not be able to shift the risk of this type of loss to an insurer. This concept has been recognized for many years.

An Eighth Circuit decision in 1934 held that there is no violation of public policy for a carrier to insure damages resulting from the acts of an employee for punitive damages, when the employer did not participate in the conduct, authorize the conduct, or know in advance that the employee would commit the wrongful act. The court in Ohio Casualty Insurance Co. v. Welfare Finance Co. stated that

[i]n this situation where there was no direct or indirect volition upon the part of the master in the commission of the act, no public policy is violated by protecting him from the unauthorized and unnatural act of his servant.

Other more recent cases in the Fifth Circuit, the Ninth Circuit, Florida, Illinois, New Jersey, and Pennsylvania follow this rationale. No case has been found that rejects outright the view that the employer can insure himself against the risk of employee misconduct if the employer does not participate in the conduct causing the damage.

Intentional Conduct

The pre-1966 standard liability policies provided insurance coverage for bodily injury “caused by accident.” Assault and battery and other intentional conduct was usually not covered, in part on

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111 75 F.2d at 60.
112 Commercial Union Ins. Co. v. Reichard, 404 F.2d 868 (5th Cir. 1968).
113 Dart Indus., Inc. v. Liberty Mut. Ins. Co., 484 F.2d 1295 (9th Cir. 1973). This case involved compensatory damages for the tort of libel, and not punitive damages. However, the Ninth Circuit, applying California law, indirectly applies the same vicarious liability rationale as is applied in cases involving insurance coverage for punitive damages.
The significant language of the old policy form was the clause that the insurance did not apply to "injuries, loss or damage . . . intentionally caused by the insured." The problem then revolved around the question whether the insured must have intended the act or have intended the injury before the exclusion applies. Generally, if the insured intended to injure, there was no coverage;\(^\text{119}\) if the insured intended to do the act, but not to injure, then there was coverage.\(^\text{120}\) For example, a firecracker is thrown with the intent to frighten, but injury results (coverage exists);\(^\text{121}\) a bomb set to kill A, but B and C are also killed (no coverage).\(^\text{122}\)

In 1966, new standard policy forms were introduced, altering the "accident" and "intentional" injury clauses of the liability policies. By replacing the word "accident" with that of "occurrence," the new policy attempted to eliminate the ambiguity as to whether an "accident" must happen "suddenly." Since the new policy specifies that the loss must be "neither expected nor intended from the standpoint of the insured," this clause also solves the problem of whether an "accident" is viewed from the viewpoint of the insured or of the victim.

There are basic policy reasons, in addition to policy language, to prohibit insurance coverage for intentional wrongful conduct. In the first place, the parties should not be permitted to control


the risk that is being insured; and, secondly, the punishment and deterrent effect of punitive damages would be eliminated if coverage were permitted in such cases. The public policy reasons become even more pronounced in prohibiting insurance coverage for intentional, wrongful conduct on the part of a manufacturer of a product, especially transportation vehicles that have wide public use. If the management of an aircraft manufacturer believes that its liability for its intentional acts can always, regardless of their outrageous, though not criminal, nature be passed off to the company's insurance carrier, the possibility (although most would agree an extremely unlikely possibility) arises that there may then be management decisions made that would not properly balance acceptable profit objectives with safety considerations. To eliminate this possibility is the public policy reason behind the general rule.

Wilful Acts—Wanton Acts

Some courts, particularly in the older cases, distinguish between wilful (not covered)\(^1\) and wanton (covered)\(^2\) misconduct, the former representing a public policy position that "wilful" conduct is the infliction of "intentional" injury and therefore cannot be insured against; whereas, "wanton" merely implies the failure to perform a duty and connotes a reckless disregard of the consequences in not doing so. Since it is not intentional, "wanton" conduct can, under some older authority, therefore be insured against. As far as insurance coverage for punitive damages is concerned, most of the more recent cases do not dwell on these rather fine distinctions.

In most states, the "wilful and wanton" conduct required to impose liability under an automobile guest act means something more than ordinary negligence, but is not conduct indicated by a literal common law construction of that term. Therefore, absent evidence of intentional or malicious conduct sufficient to award punitive damages, insurance coverage for liability under an automobile guest statute—a compensatory action—is not against public policy. How-

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ever, if the conduct is more than that required to impose liability under the statute, i.e., is sufficient to go beyond a compensatory recovery, then insurance coverage for the additional—or punitive—recovery, should not be permitted on public policy grounds.135

Because of the judicial confusion that is becoming more and more apparent in the application of punitive damage theories to products liability cases, "wilful and wanton" definitions must be carefully examined, and applied only to those products cases that otherwise involve issues of intentional, fraudulent, or deceitful conduct on the part of a manufacturer.136 Although most of the reported decisions on the insurability of punitive damages involve automobile insurance, the rationale and public policy considerations prohibiting an insurance company from insuring punitive damages apply with even greater logic and force in products liability litigation.

When corporate policy-making management does not participate in the misconduct, authorize the misconduct, or know in advance that the employee is going to commit an act of such a character so as to warrant the imposition of punitive damages, there is no

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135 See the cases collected from various jurisdictions in Annot., 20 A.L.R.3d 320 (1968).

136 For those who are interested in further investigation of the subject of punitive damages and insurance coverage, see: Annot., 123 A.L.R. 1115 (1939); 7 J. APPLEMAN, INSURANCE LAW & PRACTICE § 4312 (1942, Supp. 1974); Cole, Can Damages Properly Be Punitive, 6 JOHN MARSHALL L.Q. 477 (1941); Comment, Punitive Damages and Their Possible Application in Automobile Accident Litigation, 46 VA. L. REV. 1036 (1960); Comment, Factors Affecting Punitive Damages, 7 MIAMI L.Q. 517 (1953); Comment, Insurer's Liability for Punitive Damages, 14 Mo. L. REV. 175 (1949); Comment, Damages—Intoxicated Driver—Punitive Damages, 46 IOWA L. REV. 645 (1961); Duffy, Punitive Damages: A Doctrine Which Should be Abolished, THE CASE AGAINST PUNITIVE DAMAGES (Defense Research Institute, Inc., 1969); Fischer, Insurance Coverage and the Punitive Award in the Automobile Accident Suit, 19 U. PITT. L. REV. 144 (1957); Ghiardi, Should Punitive Damages Be Abolished?—A Statement for the Affirmative, ABA PROCEEDINGS, Section of Ins., Negl. & Comp. Law (1965); Haskell, Punitive Damages: Public Policy and the Insurance Policy, 58 ILL. ST. B. J. 780 (1970); 14 OKLA. L. REV. 220 (1961); Logan, Punitive Damages in Automobile Cases, INS. L.J. 27 (1961); C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 78 (1935); Note, Exemplary Damages in the Law of Torts, 70 HARV. L. REV. 517 (1957); 40 MICH. L. REV. 128 (1941); H. OLECK, DAMAGES TO PERSONS AND PROPERTY § 275, at 560 (1957); R. LONG, THE LAW OF LIABILITY INSURANCE § 1.26 at 1-74 & 1-75; T. SEDGEWICK, A TREATISE ON THE MEASURE OF DAMAGES § 347 et seq. (1912); Walther & Plein, Punitive Damages: A Critical Analysis, 49 MARQ. L. REV. 369 (1965); Washington, DAMAGES IN CONTRACT AT COMMON LAW, 47 LAW Q. REV. 345 (1931); 25 C.J.S. DAMAGES § 117 (1966).
compelling public policy reason to prevent a corporation from obtaining insurance for this type of risk, thereby transferring that potential liability exposure to an insurance company. The courts universally recognize this vicarious liability exception to the general rule prohibiting insurance coverage for punitive damages.\(^{157}\)

However, it is an entirely different matter when a corporation, directly through its officers and policy-making management personnel, engages in the type of outrageous and fraudulent misconduct that would warrant a punitive damage award. Indeed, in such a situation, the purposes of punitive damages in almost all states\(^{158}\) (to punish and deter) would be entirely negated if a corporation were permitted to pass off its punishment to an insurance company. Corporate management may be poorly motivated to give utmost consideration to the disastrous effect unsafe products can have on the consuming public if the rule were otherwise. Furthermore, if management is allowed to pass off liability to an insurance company for punitive damages resulting from their own acts, management would, in actuality, be passing off its own punishment to the consuming public through higher insurance premiums and higher prices. As a net result, the consuming public (and other manufacturers) would be punished for outrageous and fraudulent conduct of a single corporate management team.

One extreme example illustrates the problem. Suppose a management team of a corporation, in design conference, decides to change a product in order to save costs, and thereby be able to undercut competition by substantial price decreases. At the time, management knows that the product changes contemplated are extremely dangerous and will probably kill or injure 10% of the ultimate consumers who use the product, but nevertheless decide to make the change. If corporate management is permitted to believe that an insurance company will pay a punitive damage award rendered against the corporation resulting from that type of decision, such a result would not only negate the purpose of punitive damage awards, but also clearly be against the public interest.

Although the foregoing example is extreme, it does illustrate the problem in the products liability area in determining the proper management level that will render the wrongful conduct a “cor-

\(^{157}\) See cases cited notes 108-17 supra.

\(^{158}\) Supra notes 31, 32.
porate” act, rather than the act of an employee. Insurance coverage for a “corporate” act that results in punitive damages should be violative of public policy as a general rule; whereas, all courts agree, under the vicarious exception to the general rule, that a corporation can validly insure the risk of liability of outrageous or malicious conduct of its non-management employees.\textsuperscript{120}

It would appear clear that acts committed through decisions of the Board of Directors should be “corporate” acts. In most states, officers of a corporation are deemed to hold fiduciary and trustee relationships;\textsuperscript{130} and, since a corporation can legally act only through its officers,\textsuperscript{131} it would appear logical that wrongful conduct by a company's officers that results in punitive damages would be a “corporate” act and not insurable. Below this top management level, however, lie the myriad problems of defining layers of policy-making management that are akin to all manufacturing concerns. In the last analysis, the issue simply revolves around an equitable solution in the public interest based on the particular facts with which a court is presented. A rational and equitable balance of that public interest with a manufacturer's very real financial burdens in today's consumer-oriented society should continue to be subjects of the utmost scrutiny by the judiciary.

It may be surprising to some that no insurance policy issued today expressly excludes coverage for punitive damages, whether resulting from “corporate” acts or otherwise. Insurance carriers, especially in the aviation community, are obviously attempting to recognize and underwrite very legitimate and serious financial concerns of airlines and aircraft manufacturers. Since competition in the insurance market does not encourage insurance companies to expressly exclude punitive damage coverage, the issues of public policy involved, in whether an insurance carrier should even be permitted to pay for the civil liability the law imposes to deter or punish outrageous conduct, deserves much more careful examination by the bench and bar, particularly in terms of its long range consequences to the entire aviation community.

\textsuperscript{120} See cases cited notes 108-17 supra.
\textsuperscript{130} See Voorhees v. Mason, 245 Ill. 256, 81 N.E. 1056 (1910).
\textsuperscript{131} See Wilson v. United States, 221 U.S. 361 (1911).
Conclusion

Compared with the ordinary product liability case, aviation accidents are more spectacular, and the resulting damage to person and property is usually more severe, resulting in more substantial liability exposure. Although aircraft manufacturers sometimes express their doubts, there are still several basic, and effective, legal defenses to product liability claims brought against them. Most obvious is the defense that the aircraft was not defective. It is still the law that if any defect is found, it must have been the proximate cause of the accident. The aircraft must have been in the same condition at the time of the accident as it was when it left the manufacturer's control, and was not at that time unreasonably dangerous. The aircraft must also have been used in the manner intended to be used, and with a skill to use that aircraft for its normal and intended use. The usual legal defenses in aviation negligence cases are generally the same as those of other types of negligence cases. "Foreseeability" and "duty" must be distinguished, particularly in the "crashworthiness" area, and attempted extension of the strict liability doctrine to design problems involved in aircraft litigation should be constantly resisted.

All of these basic defenses may seem logical and are well known by all lawyers involved in product liability litigation, but the real problem to the aircraft manufacturer lies in a sometimes illogical application of the rules and an extension of some theories to satisfy an immediate social demand without there having been sufficient consideration given to longer-term considerations in the interests of both the consumer and the manufacturer. In defending aircraft manufacturers, defense counsel will have to continue to employ imaginative arguments to resist the flood of innovative ideas being advanced today to satisfy only one segment of the aviation community.

With the increasingly greater financial burdens being placed today upon both commercial and general aviation manufacturers, they and their insurance carriers are beginning to search for other methods of compensating product-induced injuries. Such a proposal was made in mid-1973 in an article appearing in "Aero Magazine."\footnote{132 (June/July 1973).} The author expressed the current problem in this fashion:
A serious disequilibrium has been developing in products liability law to the point where the continued existence of general aviation manufacturers could be threatened, new product design is discouraged, and users of general aviation aircraft foot mounting bills for astronomical and often unjustified damage awards. Underlying this disequilibrium is the tendency of the judicial system in aviation cases to overlook evidence of pilot error, and accept unconvincing evidence of product defect, so as to cause manufacturers to compensate those who have suffered the consequences of an airplane accident.\textsuperscript{130}

In suggesting that product liability decisions handed down in recent years are the beginnings of a national accident insurance system, the author proposes that the adversary right of action against an aircraft manufacturer be eliminated, and substituted with insurance to be funded by a direct tax on manufacturers and additional fuel taxes and licensing fees on general aircraft users—a cost that, according to the author, would be more than offset by reductions in individual accident insurance premiums and lower new airplane prices.\textsuperscript{134}

The hue and cry being raised with greater frequency by insurance carriers and their manufacturing insureds is reminiscent of that raised 10 or 15 years ago by those in automobile claims field. Now is the time for a much more realistic appraisal by the courts of the problems facing the manufacturers of aircraft. Now is the time to pause and reflect a bit on the long term consequences of some of the decisions already handed down. Judicial restraint at this juncture is essential if an equitable balance between the consumer and manufacturer is still deemed important for technological progress. The ever-increasing—and disproportionate—financial burdens which today face aircraft manufacturers in products litigation raises the real specter of yet another change in our historical adversary system of compensating product-induced injuries.

\textsuperscript{130} Quoted in \textit{LEGAL EAGLE NEWS} (June 1973).

\textsuperscript{134} Similar proposals are being advanced in medical malpractice cases. See, Dornette, \textit{Medical Injury Insurance—A Possible Remedy for the Malpractice Problem}, 78 \textit{CASE \& COM.}, 25 (Sept.-Oct. 1973). See also O'Connell, \textit{Expanding No-Fault Beyond Auto Insurance}. 37 \textit{THE NATIONAL UNDERWRITER} (1973) (a precis of an article to appear in an issue of the University of Virginia Law Review, which calls for "no fault" application to all kinds of accidents).